

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

75-1011

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 75-1011, 1017

UNITED STATES OF AMERICA

APPELLEE

-v-

THOMAS MC NAMARA
ALPHONSE MEROLLA

APPELLANTS

PETITION FOR REHEARING

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EASTERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket Nos. 75-1011, 1017

UNITED STATES OF AMERICA

Appellee,

v.

THOMAS MC NAMARA
ALPHONSE MEROLLA

Appellants

PETITION FOR REHEARING

PRELIMINARY STATEMENT

The UNITED STATES OF AMERICA, by DAVID G. TRAGER, United States Attorney for the Eastern District of New York, hereby petitions for rehearing of the judgment of a panel entered August 11, 1975, which reversed the judgments of the United States District Court for the Eastern District of New York (John F. Dooling, J.).

STATEMENT OF FACTS

On August 11, 1975 this Court (the Honorable L. Moore, J., the Honorable W. Mansfield, J., and the Honorable J. Holden, J.) reversed the convictions of the Appellants for a violation of the Hobbs Act, Title 18, United States Code, Section 1951, on the grounds that the United States

had failed to prove an affect on commerce.

**REASONS FOR GRANTING
THE PETITION FOR REHEARING**

The decision of this Court reflects not only an untrue state of facts but also a too narrow view of the manner in which commerce can be affected.

1. In his Reply Brief, which was filed untimely, the Appellant Merella had urged that there could be no affect upon commerce because of the "one shot" nature of the Goberman-McNamara contract, that this was Goberman's first contracting venture, that all money on the contract had been paid and that all necessary materials had been ordered and delivered. In reversing the convictions, the Court stated:

Har Mac appeared to be a one-shot deal arising out of Goberman's fast friendship with Mc Namara. Not only was this Goberman's sole construction venture, but also, as the record indicates, all necessary material for the project had already been delivered to the site by June 5---the date Appellants first extorted property from Goberman. Thus there is no reason to believe that Goberman would have purchased goods in interstate commerce for the showroom project or any other construction project had his buying power not been diminished. (Slip op. p. 5538)

We submit that this panel's conclusion does not reflect the true state of facts. The record reveals that the Mc Namara job was not the only venture in which Mr. Goberman had entered as contractor. Rather, he was at the very time of the trial, self-employed in construction (260-61, 356¹). Nor was this Mr. Goberman's first construction venture as an entrepreneur. Rather, at least as far back as February, 1968 Mr. Goberman was the contractor on a building job (382-83). Nor were these Mr. Goberman's sole entrepreneurial ventures. The record reveals that Mr. Goberman had been in

1. Numerals in parenthesis refer to pages of the transcript of the trial.

business with his brother Alan (who at the time of the extortion had his own construction firm) approximately 10-14 years prior to the trial (502). In addition, Mr. Goberman had interests in other corporations involved apparently, in construction: East Gull Concrete and State Steel (432-33). In addition, the record reveals he had also done construction work in Pennsylvania (459).

Nor was the recitation of the commerce in which Mr. Goberman was involved on the Mc Namara job complete. The record reveals that in addition to the lighting apparatus, the steel, and the over head doors, Mr. Goberman had also ordered bifold exterior doors from a firm in Rhode Island and asphalt interstate (281).²

Nor is the conclusion that all necessary materials were delivered by June 5, 1972 accurate. The record reveals that an overhead door necessary to complete Mr. Brady's subcontracting job was not delivered to the site from New Jersey until June 19, 1972, which was two weeks after the beating of Mr. Goberman on June 5, 1972 (1552). In fact, a necessary part for Mr. Brady's job had to be ordered on July 7, 1972 after the contract release and receipt were beaten out of Goberman on June 28, 1972 (1554-55). Rather than a one-shot deal by an over reaching employee, the record reveals that the Mc Namara job was just one in a series of entrepreneurial ventures by Mr. Goberman, that he had previously received goods in commerce and that he was still receiving

2. It should be noted that the record is silent on when and if those goods were delivered.

goods in commerce at the time of the extortion by the Appellants.

2. Even if the panel's conclusions of fact were correct, nevertheless, the Government respectfully submits, that it proved an affect on commerce, since the record reveals that as of the time Mr. Goberman was forced to sign the contract release, he owed Mr. Brady, one of the suppliers of goods in commerce, for the goods supplied and installed by Mr. Brady.³ It is submitted that in diminishing Mr. Goberman's ability to pay for goods ordered and delivered in commerce, commerce is adversely affected.

The Hobbs Act does not protect only the movement of goods in commerce, it also protects the "stream of commerce" itself from obstruction. Battaglia v. United States, 383 F.2d 303, 305-06 (9th Cir. 1967), cert. denied, 390 U.S. 907 (1968).

It is axiomatic and the record reveals (1548-49) that the stream of commerce, flows two ways. For every movement of goods, there is also a causative agreement to pay some consideration. In the instant case, the record reveals that as of June 5, the date of the first extortion and concomitant diminution in Mr. Goberman's assets, there were still goods not yet delivered and unpaid for, and as of June 28, the date of the second extortion and diminution in Mr. Goberman's assets, there had still been no payment for the goods delivered in commerce.(1548-49, 1552).

3. While in fairness it should be noted that Brady was later paid by Mc Namara, that fact is immaterial. It is also interesting to compare the manner in which Mr. Brady who had a "wonderful" relationship with the Appellant Mc Namara was treated with the manner in which Edward Tew, another subcontractor, was treated when he attempted to collect from Mc Namara.

In diminishing Mr. Goberman's ability to pay for those goods on order and unpaid for, commerce was surely affected, because that stream stops flowing perforce when its lifeblood, credit, is undermined.

Surely, if commerce is affected when a pool table shipped in commerce cannot be used, within the confines of a bar, as in Battaglia, supra. so too is commerce affected when payment for goods shipped in commerce cannot be made by the recipient, as in the instant case.

CONCLUSION

THE PETITION FOR REHEARING SHOULD BE GRANTED. THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Dated: Brooklyn, New York
September 24, 1975

Respectfully Submitted,

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STATE OF NEW YORK
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EASTERN DISTRICT OF NEW YORK } ss

Catherine Castagna

being duly sworn,

deposes and says that she is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 24th day of September 19 75 she served a copy of the within

Petition for rehearing

by placing the same in a properly postpaid franked envelope addressed to:

Phyllis Skloot Bamberger, Federal Defender Services Unit

509 United States Courthouse, Foley Square

New York, New York 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Catherine Castagna

Sworn to before me this

24th day of Sept

19 75

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STATE OF N.Y. 30-3610090
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TERM EXPIRES 3-30-77

Richard E. S. Ramey

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

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S. Hazard Gillespie, Davis Polk & Wardwell

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New York, New York

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Catherine Castagna

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Richard L. Shankmy

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